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Supreme Court of the United States

OCTOBER TERM, 1965

No. 455

In the Matter of

ANONYMOUS, An Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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Respondent's answering argument takes two directions. In the first of these respondents argue that a denial of due process, occurring during a trial, and which can be corrected before the matter is concluded, may not be considered by this Court until a final judgment has resulted. The petitioner respectfully takes a contrary view.

It would seem the very essence of due process requires that when its denial becomes clear such denial should, and must, be corrected immediately, if it is possible to correct, so that the trial can proceed, if it can so proceed, to an appropriate conclusion in accordance with the concept of due process. In most cases this cannot be achieved. In the case at bar it can still be achieved.

So far as jurisdiction of this Court is concerned, when a denial of due process in a proceeding has occurred finality exists, for a judgment resulting after such a denial is a nullity. Accordingly, the Court may entertain jurisdiction at this point because the posture of the proceeding at this stage still permits correction and no sound reason exists why the petitioner should risk a disciplinary judgment when such risk can still be avoided.

The second argument advanced by respondents is that a disciplinary proceeding is neither a criminal nor a civil proceeding. In their view it is some sort of hybrid which proceeds in accordance with its own special rules. The respondents argue that in accordance with these special "rules" the petitioner has been fairly and equitably treated.

The difficulty with respondent's position is that there are no such rules and the Court of Appeals has held that a disciplinary proceeding in New York is a civil proceeding.

Matter of Mathot, 222 N. Y. 8.

Not only are there no rules, but each of the departments seems to vary in the procedures followed. In the Appellate Division, Second Department, a respondent in a disciplinary is allowed a full and complete disclosure of all material assembled in the course of investigation so as to enable such a respondent to make a full and complete defense. Thus, in *Matter of Klein,* A.D. 2d (not yet officially published), 262 N.Y.S. 2d 416, the opinion of the Second Department, at page 419, discloses the following:

> "After the service of the 'answer' and between February 8, 1956 and April 29, 1965, pursuant to authorization of this court to examine the records

> of the Judicial Inquiry, the respondent on thirty-two separate days appeared at its office and there examined the minutes, exhibits and records in its possession pertaining to the charges against him."

In the case at bar, a First Department case, no such disclosure was afforded, and efforts to gain the same were unsuccessful. Thus, discovery in a disciplinary proceeding depends on the particular department of the court in which the proceeding is pending.

In essence, then, in New York, whether a respondent in a disciplinary will be permitted the opportunity to make a full and complete defense depends upon the particular department of the Appellate Division in which he happens to find himself. This hardly seems to connote an equal protection of the laws or a proceeding conducted in accordance with stated rules.

Respectfully submitted,

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